IN THE DISTRICT COURT OF NEW MEXICO,
FIRST JUDICIAL DISTRICT

No. 78-438(C)

Relevant Portions of 25 C.F.R. Parts 271 and 274

25 C.F.R. § 271.2

* * * *

(q) "Tribal governmental function" means all programs authorized to be administered by the Bureau for the benefit of Indians enumerated as line items in the Bureau's annual budget requests under the Activities of Education and Indian Services, the Subactivities of Direct Employment and Road Maintenance, and those programs related to Irrigation and Power Operation and Maintenance identified as a part of the subactivity minerals, mining, irrigation and power under the Activity of Tribal Resources Development.

(r) "Tribal organization" means the recognized governing body of any Indian tribe; or any legally established organization of Indians or tribes which is controlled, sanctioned, or chartered by such governing body or bodies or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; *Provided,* That a request for a contract must be made by the tribe that will receive services under the contract; *Provided further,* That in any case where a contract is let to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting of such contract.

* * * *

25 C.F.R. § 274.3

* * * *

(m) "Minimum school facilities" means classroom and auxiliary rooms and initial equipment necessary to operate an approved educational program for the membership of the school at normal capacity in accordance with criteria established by the Bureau.

(n) "Previously private school" means a school (other than a Federal school formerly operated by the Bureau), that is operated primarily for Indian students from age 3 years through grade(s) 12; and, which at the time of application is controlled, sanctioned, or chartered by the governing body(s) of an Indian tribe(s).

* * * *

25 C.F.R. § 274.24 Performing construction work.

When a project has been placed on the commitment-to-fund listing, the applicant will be given the following options, subject to approval by the requesting tribe(s):

(a) To negotiate a contract with the Bureau to perform all of the work or part of the work needed for the project with the Bureau performing the rest. Such contracts shall comply with the requirements in Subpart C of this Part and with 41 CFR Part 14H-70.

25 C.F.R. § 274.26 Funding provisions.

(a) No funds from any contract under this Part shall be made available by the Bureau directly to other than Indian tribes and tribal organizations. However, Indian tribes and tribal organizations assisted under this Part may use funds provided to subcontract for necessary services.

(b) Twenty-five (25) per cent of all funds appropriated under Title II, Part B, section 204 of the Act shall be expended for construction of previously private schools controlled and managed by a tribal organization. Any

unobligated funds will be retained until completion of the project and unexpended funds returned to the Bureau. Projects which are partially funded shall be given first consideration for the additional funding necessary to complete such projects.

25 C.F.R. § 274.33 Facilities construction.

(a) The Commissioner may assist in preconstruction and construction activities to assure conformity with the requirements of the Act. Approval of all proposed preconstruction documents will be obtained from the Commissioner. Assistance prior to the preparation of these and similar documents will be provided, upon request, by the Commissioner or his representative. A preliminary conference may be suggested with the project architect and others if that seems desirable. The Commissioner will provide sufficient copies of all forms used to prepare the documents rquired for the project.

* * * *

25 C.F.R. § 274.6 Applicable procurement regulations.

41 CFR Part 14H-70 provides the contract clauses which shall be included in contracts made with tribal organizations under this part and places some requirements on them in addition to those given in this Subpart.

25 C.F.R. § 31a.4

* * * *

(i) Choice of school. Afford Indian and Alaska Native students the opportunity to attend local day schools and other schools of choice and the option to attend boarding schools when the student and parent or guardian determine

it is in the student's best interest and consistent with the provisions of the Indian Child Welfare Act of 1978 (Pub. L. 95-608) except that, residential schools shall not be used as substitutes for providing adequate local family social services. Each school shall establish its attendance area in cooperation with neighboring schools.

* * * *

(p) *Education close to home.* Provide day and residential educational services as close to an Indian or Alaska Native student's home as possible, except when a student elects to attend a school elsewhere for specialized curricular offerings or services.

* * * *

(s) *Planning, maintenance and use of facilities.* (1) Ensure that the needs of the students and Tribal or Alaska Native community will receive first priority in the planning, design, construction, operation and maintenance of Bureau schools and residential facilities, rather than other considerations, such as ease of maintenance, and that these facilities assure a supportive environment for learning, living and recreation.

* * * *

41 C.F.R. 14H-70.632 Subcontractor cost and pricing data.

The following clause should be included in all contracts, when the subcontracts of the type and size described herein are contemplated.

SUBCONTRACTOR COST AND PRICING DATA

(a) The contractor shall require subcontractors hereunder to submit in writing cost or pricing data under the following circumstances:

(1) Prior to award of any cost-reimbursed type, time and material, labor-hour, incentive, or price determinable

subcontract the price of which is expected to exceed $100,000; and

(2) Prior to the award of any other subcontract, the price of which is expected to exceed $100,000, or to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000, where the price or price adjustment is not based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public or prices set by law or regulation.

(b) The contractor shall require subcontractors to certify, in substantially the same form as that used in the certificate by the Prime Contractor to the Government, that, to the best of their knowledge and belief, the cost and pricing data submitted under (a) above are accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract change or modification.

(c) The contractor shall insert the substance of this clause including this paragraph (c) in each of his cost-reimbursement type, time and material, labor-hour, price redeterminable, or incentive subcontracts hereunder, and in any other subcontract hereunder which exceed $100,000 unless the price thereof is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. In each such excepted subcontract hereunder which exceed $100,000, the contractor shall insert the substance of the following clause:

SUBCONTRACTOR COST AND PRICING DATA — PRICING ADJUSTMENTS

(a) Paragraphs (b) and (c) of this clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this con-

tract which involves a price adjustment in excess of $100,000. The requirements of this clause shall be limited to such price adjustments.

(b) The contractor shall require subcontractors hereunder to submit cost or pricing data under the following circumstances:

(a) Prior to award of any cost-reimbursement type, time and material, labor-hour, incentive, or price redeterminable subcontract, the price of which is expected to exceed $100,000; and —

(2) Prior to award of any other subcontract, the price of which is expected to exceed $100,000, or to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000, where the price or price adjustment is not based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(c) The contractor shall require subcontractors to certify, in substantially the same form as that used in the Certificate by the Prime Contractor to the Government, that, to the best of their knowledge and belief, the cost and pricing data submitted under (b) above are accurate, complete, and current as of the date of the execution, which date shall be as close as possible to the date of agreement on the negotiated price of the contract modification.

(d) The contractor shall insert the substance of this clause including this paragraph (d) in each subcontract hereunder which exceeds $100,000.

41 C.F.R. § 14H-70.803 Performance bonds.

(a) Performance bonds will not be required from an Indian tribe or Indian organization serving as a governmental instrumentality or an Indian tribe; *Provided,* That such

tribe or tribal organization shall require any subcontractor performing work under the contract to provide a performance bond in the amount and manner set forth in § 1-10.104-1 of this title.

(b) The clause to be included in construction contracts with Indian tribes and Indian organizations relative to performance bonds is set forth in § 14H-70.621.

41 C.F.R. § 14H-70.804 Payment bonds.

(a) Payment bonds will not be required from an Indian tribe or Indian organization serving as a governmental instrumentality of an Indian tribe; However, such tribe or tribal organization shall require any subcontractor performing work under the contract to provide a payment bond in the amount and manner set forth in § 1-10.105-1 of this title.

(b) The clause to be included in construction contracts with Indian tribes and Indian organizations relative to payment bonds is set forth in § 14H-70.621.

Excerpts from Ex. P-1(a), Title 10, Navajo Tribal code, (Tr. 38)

"The value attached to home living with school attendance on a day basis remains a primary objective of tribal and Bureau policy." Res. No. CAU-43-61, Aug. 29, 1961; T. 10, prec. Sec. 1, NTC.

* * * *

"The Navajo Tribe is committed to the continuous improvement in the quality of education available to the

Navajo people." Res. CAU-87-69 (authorizing Chapters to establish local Navajo community school boards), Aug. 8, 1969, T. 10, sec. 51 N.T.C.

* * * *

"Statement of aims and objectives of the Navajo Local Community School Board Program. . . .

1. To seek maximum involvement of parents and Tribal leaders in the education program." *Ibid.*

* * * *

"The Navajo Tribal Council has given full support and cooperation to accomplishment of the objectives of the Navajo education programs and maintains a deep and active interest in the education of all Navajo children . . ." Res. CO-38-55, Oct. 13, 1955, T. 10, Sec. 101, N.T.C.

* * * *

"The Navajo Tribe, recognizing that the future well-being of its members is dependent upon adequate and readily available opportunities for education, desires to encourage the construction and operation of schools at all places in the Navajo country where there are sufficient numbers of children. . . ." (withdrawing land for school sites) Res. CN-76-53, _____, 1953, and Res. CJ-37-58, sec. 1, July 21, 1958, T. 10, sec. 421-422, N.T.C.

* * * *

"The failure to provide schools and teachers as specified in the Treaty of 1868 has visited the greatest hardship upon the adult population of Navajos who lost the opportunity in their younger years to acquire even elementary education."

A-9

Res. CF-12-61, Feb. 14, 1961, T. 10, sec. 461, N.T.C.

* * * *

The Special Senate Subcommittee on Indian Education made these findings:

I. **POLICY FAILURE**

The dominant policy of the Federal Government towards the American Indian has been one of coercive assimilation. The policy has resulted in:

A. The destruction and disorganization of Indian communities and individuals.

B. A desperately severe and self-perpetuating cycle of poverty for most Indians.

C. The growth of a large, ineffective, and self-perpetuating bureaucracy which retards the elimination of Indian poverty.

D. A waste of Federal appropriations.

II. **NATIONAL ATTITUDES**

The coercive assimilation policy has had a strong negative influence on national attitudes. It has resulted in:

A. A national that is massively uninformed and misinformed about the American Indian, and his past and present.

B. Prejudice, racial intolerance, and discrimination towards Indians far more widespread and serious than generally recognized.

III. **EDUCATION FAILURE**

The coercive assimilation policy has had disastrous effects on the education of Indian children. It has resulted in:

A. The classroom and the school becoming a kind of

battleground where the Indian child attempts to protect his integrity and identity as an individual by defeating the purposes of the school.

B. Schools which fail to understand or adapt to, and in fact often denigrate, cultural differences.

C. Schools which blame their own failures on the Indian student and reinforce his defensiveness.

D. Schools which fail to recognize the importance and validity of the Indian community. The community and child retaliate by treating the school as an alien institution.

E. A dismal record of absenteesim, dropouts, negative self-image, low achievement, and, ultimately, academic failure for many Indian children.

F. A perpetuation of the cycle of poverty which under-mines the success of all other Federal programs.

IV. **CAUSES OF THE POLICY FAILURE**

The coercive assimilation policy has two primary historical roots:

A. A continuous desire to exploit, and expropriate, Indian land and physical resources.

B. A self-righteous intolerance of tribal communities and cultural differences.

Senate Report No. 91-501, 91st Congress, 1st Session, page 21. (emphasis in original)

---

25 U.S.C. § 263.

The President is authorized, whenever in his opinion the public interest may requre the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all ap-

plications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

25 U.S.C. § 264.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilzed Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.

25 U.S.C. § 478b.

All laws, general and special, and treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said sections. Nothing in said sections shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application said sections.